

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of : December 28, 2007
N. Feng, et al : Group Art No.: 2145
Serial No. 09/772,011 : Examiner: A. Q. Choudhury
Filed: January 27, 2001 : for IBM Corporation
Anne Vachon Dougherty
Title: METHOD FOR BALANCING 3173 Cedar Road
LOAD AMONG MIRROR SERVERS Yorktown Hts, NY 10598

REQUEST FOR ENTRY OF PRE-APPEAL BRIEF REQUEST FOR REVIEW

Commissioner for Patents
Sir:

In response to the Final Office Action dated June 28, 2007 for the above-identified patent application, Applicants submitted a Notice of Appeal, a Pre-Appeal Brief Request for Review including cover page (PTO form SB/33) and four pages of supporting arguments, a Petition for Extension of Time with fee, and an acknowledgement postcard via Express Mail on October 29, 2007. Copies of the filed papers, Express Mail receipt, and the stamped acknowledgement postcard are attached hereto.

Due to the fact that Applicants' attorney had not received a Decision from the Pre-Appeal Brief Review, Applicants' attorney placed several calls to the Patent Office to ascertain the status of the application. In a December 28, 2007 a telephone interview was conducted between the undersigned attorney and Jeff Gaffin, the Acting Group Director for 2100. A copy of the Interview Summary is

attached hereto. In the telephone interview, Applicants' undersigned attorney was informed that a Notice indicating that the Pre-Appeal Brief Request for Review was defective had been mailed on December 10, 2007. The Notice indicated that the request was defective since it did not include a title.

Applicants respectfully assert that the title, "Pre-Appeal Brief Request for Review", is clearly shown on the cover page, form SB/33, which was submitted on October 29, 2007. It was suggested by Acting Group Director Gaffin that the cover page may not have been properly scanned at the PTO.

Acting Group Director Gaffin recommended that following actions be taken:

- that Applicants' attorney transmits copies of the submitted documents corroborating that the "titled" request was filed on October 29, 2006; and
- that Mr. Gaffin e-mails the PTO center responsible for scanning submitted documents to locate the cover page, form SB/33 entitled "Pre-Appeal Brief Request for Review".

Applicants respectfully request entry of the Pre-Appeal Brief Request for Review as of the original submission date based on the attached evidence of submission.

Should any further information be required, it is asked that the undersigned attorney be contacted directly via telephone.

Should any additional fees be required for entry of the Request, authorization is given to charge Deposit Account 50-0510.

Should a Petition for Extension of Time be required for entry of the submission, this paper is to be interpreted as said Petition and any associated fee charged to Deposit Account 50-0510.

Respectfully submitted,

N. Feng, et al

By: /Anne Vachon Dougherty/
Anne Vachon Dougherty
Registration No. 30,374
Tel. (914) 962-5910

EB194546648US

PTO/SB/01 (04-05)

Approved for use through 07/31/2005, OIA/01-0001

U.S. Patent and Trademark Office U.S. DEPARTMENT OF COMMERCE

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NOTICE OF APPEAL FROM THE EXAMINER TO THE BOARD OF PATENT APPEALS AND INTERFERENCES		Docket Number (Optional) JP919990263US1	
I hereby certify that this correspondence is being personally transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" (37 CFR 1.5(b)) on October 29, 2007		In re Application of N. Feng	
Signature <i>Anne Vachon Dougherty</i> Typed or printed name Anne Vachon Dougherty		Application Number 09/772,011	Filed 01/27/2001
		For METHOD FOR BALANCING SERVERS	
		Art Unit 2145	Examiner A.-Q. Choudhury
Applicant hereby appeals to the Board of Patent Appeals and Interferences from the last decision of the examiner.			
The fee for this Notice of Appeal is (37 CFR 41.20(b)(1))		\$ 510.00	
<input type="checkbox"/> Applicant claims small entity status. See 37 CFR 1.27. Therefore, the fee shown above is reduced by half, and the resulting fee is: \$ _____			
<input type="checkbox"/> A check in the amount of the fee is enclosed.			
<input type="checkbox"/> Payment by credit card. Form PTO-2038 is attached.			
<input type="checkbox"/> The Director has already been authorized to charge fees in this application to a Deposit Account. I have enclosed a duplicate copy of this sheet.			
<input checked="" type="checkbox"/> The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 50-0510 . I have enclosed a duplicate copy of this sheet.			
<input type="checkbox"/> A petition for an extension of time under 37 CFR 1.138(b) (PTO/SB/22) is enclosed.			
WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.			
I am the			
<input type="checkbox"/> applicant/inventor.		<i>Anne Vachon Dougherty</i> Signature Anne Vachon Dougherty Typed or printed name	
<input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/26)			
<input checked="" type="checkbox"/> attorney or agent of record Registration number 30,374		(914) 962-5910 Telephone number	
<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34: _____		October 29, 2007 Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.			
<input checked="" type="checkbox"/> Total of 1 forms are submitted.			

This collection of information is required by 37 CFR 41.31. The information is required to obtain or receive a benefit by the public which is to be paid by the USPTO to process an application. Confidentiality is governed by 36 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-6190 and select option 2.

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

Approved for use through 10/30/2007. OMB 0651-0001

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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) JP919990263US1	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] <u>October 29, 2007</u> Signature <u><i>Anne Vachon Dougherty</i></u> Typed or printed name <u>Anne Vachon Dougherty</u>		Application Number 09/772,011	Filed 01/27/2001
First Named Inventor N. Feng		Examiner A. Q. Choudhury	
Art Unit 2145		Examiner A. Q. Choudhury	
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96) <input checked="" type="checkbox"/> attorney or agent of record. 30,374 Registration number <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____			
Signature <u><i>Anne Vachon Dougherty</i></u> Anne Vachon Dougherty Typed or printed name		(914) 962-5910 Telephone number October 29, 2007 Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.			
<input checked="" type="checkbox"/> Total of <u>1</u> forms are submitted.			

This collection of information is required by 35 U.S.C. 122. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

The claims recite a system, method, and program storage device for dynamically providing load balancing among a plurality of mirror servers during a user session with a web site. When a user at a client machine contacts a web site, the web page and a predetermined script are transmitted to the client. The predetermined script is automatically executed at the client to establish connections with each of the plurality of mirror servers associated with the web page that are available to serve the client's request. As the connections are established between the client and each of the mirror servers, the response times are measured. The client selects the mirror server with the most favorable response time as the selected mirror server to handle the user's next request during that session. The "load balancing" is done at the client location by evaluating the response times. The user's next action during that session will be sent to the mirror server selected as the fastest. Accordingly, the present invention provides client-side "load balancing" by selecting the fastest server and sending the next request/action in the user session to that selected server.

The claims have been rejected as unpatentable over the Kenner patent. The Kenner patent is directed to server-side optimization of data delivery on a distributed computer network. Kenner provides a plurality of mirror servers, each of which is capable of responding to a client's request for data delivery. Each client is provided with software which includes a configuration utility and a client program. "The configuration utility is used first to determine which delivery sites provide improved performance for that particular user" (Col. 5, lines 39-43). Tests are run and the test results are provided to

the service provider's database (Col. 5, lines 57-60). Thereafter the delivery site chosen by the server configuration utility is used for all requests and sessions by that user for the retrieval of content managed by the delivery system service provider (Col. 5, lines 61-63). Kenner teaches that a server selection is made in advance as to which delivery site/mirror server will handle a client's requests. The determination is made prior to the client making any requests. Kenner expressly states that "the configuration utility 34 must be run by the user...before the user terminal 12 will have access to the system" (Col. 8, lines 37-41). Clearly Kenner is neither teaching nor suggesting that a server be dynamically selected by the client during a session to handle the next action within that session. Kenner does not teach that the determination is made in response to the client accessing the web page. Rather, Kenner's client must execute the configuration utility prior to joining the system and prior to issuing any client requests.

Applicants further note that Kenner does not teach or suggest that the configuration utility be downloaded upon access to a web site in response to a user request to browse that web site. Rather, Kenner requires that the configuration utility be run before the user terminal will have access to the system (Col. 8, lines 37-41). While Kenner does teach that the configuration utility can be downloaded from the MSP server, Kenner neither teaches nor suggests that the configuration utility be downloaded for each session upon access to a web site in response to a user request to browse the web site.

Applicants respectfully assert that the Kenner patent does not obviate the invention as claimed. As is expressly

recited in the independent claims, the present invention provides steps and means for transmitting the web page and the predetermined script "when said web page is accessed by a client in response to user input to establish a session" (Claims 1-10 and 20) and "in response to user input to establish a session to browse said web site" (Claims 11-19). Further, the claims recite selecting a mirror server to handle the next user action during the session. Kenner does not teach or suggest the claim features.

For a determination of obviousness, the prior art must teach or suggest all of the claim limitations. "All words in a claim must be considered in judging the patentability of that claim against the prior art" (In re Wilson, 424 F. 2d 1382, 1385, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970)). If the cited references fail to teach each and every one of the claim limitations, a *prima facie* case of obviousness has not been established by the Examiner. Since Kenner does not teach steps and means for transmitting the web page and the predetermined script "when said web page is accessed by a client in response to user input to establish a session" (Claims 1, 3-10 and 20) and "in response to user input to establish a session to browse said web site" (Claims 11-19), and does not teach selecting a mirror server to handle the next user action during the session (Claims 1 and 3-20), it cannot be maintained that the claims are unpatentable over Kenner.

The Examiner has taken "official notice" of the fact that software can be downloaded through HTTP in a network. However, Applicants maintain that, even if one having skill in the art sought to modify Kenner by downloading software, the modified Kenner system would still not obviate the present invention since there is no teaching or suggestion

of downloading software in a session to execute the software for a client to select a server to handle the next request in the session.

The Examiner has made conclusory statements about Kenner which are not supported by the Kenner teachings. For example, the Examiner states that "a browser can be directed to the MSP and a software can be downloaded through a webpage interface"-but Kenner doesn't teach that. Further the Examiner concludes that "[m]odern processors and operating systems enable multithreaded execution", however Kenner does not teach or suggest multithreaded execution of a script within a session to select a server to handle the next action in that session.

Applicants contend that obviousness cannot be maintained without some teaching or suggestion of the claim features. The Federal Circuit has stated that when patentability turns on the question of obviousness, the obviousness determination "must be based on objective evidence of record" and that "this precedent has been reinforced in myriad decisions, and cannot be dispensed with." (In re Lee, 277 F. 3d 1338, 1343 (Fed. Cir. 2002)). The Federal Circuit has stated that "conclusory statements" by an examiner fail to adequately address the factual question of motivation, which is material to patentability and cannot be resolved "on subjective belief and unknown authority" (Id. at 1343-1344). Accordingly, Applicants maintain that the Examiner has not established that the pending claims are *prima facie* obvious.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of April 11, 2007

N. Feng, et al : Group Art No.: 2145

Serial No. 09/772,011 : Examiner: A. Q. Choudhury

Filed: January 27, 2001 for IBM Corporation
Anne Vachon Dougherty
3173 Cedar Road
Yorktown Hts, NY 10598

Title: METHOD FOR BALANCING
LOAD AMONG MIRROR SERVERS

PETITION FOR EXTENSION OF TIME

Commissioner for Patents

Sir:

Applicants hereby petition for an extension of time for a period of one month to respond to the Office Action dated June 28, 2007. The period for response, which had been set to expire on September 28, 2007, will now expire on October 29, 2007, since the 28th fell on a weekend. A check in the amount of \$120.00 is enclosed. Authorization is hereby given to charge Deposit Account 50-0510 should any additional charges be required.

Respectfully submitted,

N. Feng, et al

By: Anne Vachon
Anne Vachon Dougher
Reg. No. 30,374
Tel. (914) 962-5910

PLEASE ACKNOWLEDGE AND RETURN Date mailed: 29 October 2007
Express MAIL: EB194546648 US

Paper filed: Notice of Appeal, Request for Pre-Appeal Brief
Review, Petition for Extension, Fee, Postcard

Docket: JP919990263 US 1

In Appellate: N. Feng, et al

Title: METHOD FOR BALANCING LOAD AMONG HYBRID SERVERS

Filing Date: 1/27/01

Serial No: 09/772,011

Attorney: AVD



EB 194546648 US



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Paper filed: Notice of Appeal, Request for Pre Appeal Brief
Review, Petition for Extension, Fee, Postcard

Docket: JP919990263 US 1

In Appln Of: N. Feng, et al

Title: METHOD FOR BALANCING LOAD AMONG MIRROR SERVERS

Filing Date: 1/27/01

Serial No: 09/772,011

Attorney: AVD | ||| ||||| ||



12/28/2007
TO: Anne VACHON
DOUGHERTY

FROM: JEFF GAFFIN
Acting Director
TC 2100

As per our phone call of
12/28/2007

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UNITED STATES DEPARTMENT OF COMMERCE

U.S. Patent and Trademark Office

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APPLICATION NO/ CONTROL NO.	FILING DATE	FIRST NAMED INVENTOR / PATENT IN REEXAMINATION	ATTORNEY DOCKET NO.
09772011	1/29/2001	FENG ET AL.	JP919990263-US1

Anne Vachon Dougherty
3173 Cedar Road
Yorktown Heights, NY 10596

EXAMINER

Choudhury, Anirul O

ART UNIT

PAPER

2145

20071228


DATE MAILED:

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner for Patents

Interview Summary	Application No.	Applicant(s)	
	09/772,011	FENG ET AL.	
	Examiner	Art Unit	
	Choudhury, Azizul Q	2145	

All participants (applicant, applicant's representative, PTO personnel):

(1) Jeffrey A. Gaffin  (3) _____

(2) Anna Vachon Dougherty (4) _____

Date of Interview: 26 December 2007.

Type: a) ☒ Telephonic b) ☐ Video Conference
c) ☐ Personal [copy given to: 1) ☐ applicant 2) ☐ applicant's representative]

Exhibit shown or demonstration conducted: d) ☐ Yes e) ☒ No.
If Yes, brief description: _____.

Claim(s) discussed: N/A.

Identification of prior art discussed: N/A.

Agreement with respect to the claims f) ☐ was reached. g) ☐ was not reached. h) ☒ N/A.

Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: See Continuation Sheet.


(A fuller description, if necessary, and a copy of the amendments which the examiner agreed would render the claims allowable, if available, must be attached. Also, where no copy of the amendments that would render the claims allowable is available, a summary thereof must be attached.)

THE FORMAL WRITTEN REPLY TO THE LAST OFFICE ACTION MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW. (See MPEP Section 713.04). If a reply to the last Office action has already been filed, APPLICANT IS GIVEN A NON-EXTENDABLE PERIOD OF THE LONGER OF ONE MONTH OR THIRTY DAYS FROM THIS INTERVIEW DATE, OR THE MAILING DATE OF THIS INTERVIEW SUMMARY FORM, WHICHEVER IS LATER, TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW. See Summary of Record of Interview requirements on reverse side or on attached sheet.

Examiner Note: You must sign this form unless it is an Attachment to a signed Office action.

Examiner's signature, if required

Continuation of Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: Ms. Dougherty called the PTO as she had not received a response to her Request for Pre-Appeal Conference which was filed on 10/29/2007. PTO records indicate a Notice of Panel Decision from Pre-Appeal Brief Review was mailed 12/10/2007 indicating the Request was improper due to the Request lacked a title. Ms. Dougherty said she had not received such Decision and further indicated the Request was submitted with a title page. Acting Director Gaffin indicated he would fax her an 'unofficial' copy of this Interview Summary which will be mailed concurrently. Acting Director Gaffin will also e-mail appropriate PTO personnel to see if such title page was lost by the PTO.



Summary of Record of Interview Requirements

Manual of Patent Examining Procedure (MPEP), Section 713.04, Substance of Interview Must be Made of Record

A complete written statement as to the substance of any face-to-face, video conference, or telephone interview with regard to an application must be made of record in the application whether or not an agreement with the examiner was reached at the interview.

Title 37 Code of Federal Regulations (CFR) § 1.133 Interviews
Paragraph (b)

In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not remove the necessity for reply in Office action as specified in §§ 1.111, 1.135. (35 U.S.C. 132)

37 CFR §1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

The action of the Patent and Trademark Office cannot be based exclusively on the written record in the Office if that record is itself incomplete through the failure to record the substance of interviews.

It is the responsibility of the applicant or the attorney or agent to make the substance of an interview of record in the application file, unless the examiner indicates he or she will do so. It is the examiner's responsibility to see that such a record is made and to correct material inaccuracies which bear directly on the question of patentability.

Examiners must complete an Interview Summary Form for each interview held where a matter of substance has been discussed during the interview by checking the appropriate boxes and filling in the blanks. Discussions regarding only procedural matters, directed solely to restriction requirements for which interview recordation is otherwise provided for in Section §12.01 of the Manual of Patent Examining Procedure, or pointing out typographical errors or unreadable script in Office actions or the like, are excluded from the interview recordation procedures below. Where the substance of an interview is completely recorded in an Examiners Amendment, no separate Interview Summary Record is required.

The Interview Summary Form shall be given an appropriate Paper No., placed in the right hand portion of the file, and listed on the "Contents" section of the file wrapper. In a personal interview, a duplicate of the Form is given to the applicant (or attorney or agent) at the conclusion of the interview. In the case of a telephone or video-conference interview, the copy is mailed to the applicant's correspondence address either with or prior to the next official communication. If additional correspondence from the examiner is not likely before an allowance or if other circumstances dictate, the Form should be mailed promptly after the interview rather than with the next official communication.

The Form provides for recordation of the following information:

- Application Number (Series Code and Serial Number)
- Name of applicant
- Name of examiner
- Date of interview
- Type of interview (telephonic, video-conference, or personal)
- Name of participant(s) (applicant, attorney or agent, examiner, other PTO personnel, etc.)
- An indication whether or not an exhibit was shown or a demonstration conducted
- An identification of the specific prior art discussed
- An indication whether an agreement was reached and if so, a description of the general nature of the agreement (may be by attachment of a copy of amendments or claims agreed as being allowable). Note: Agreement as to allowability is tentative and does not restrict further action by the examiner to the contrary.
- The signature of the examiner who conducted the interview (if Form is not an attachment to a signed Office action)

It is desirable that the examiner orally remind the applicant of his or her obligation to record the substance of the interview of each case. It should be noted, however, that the Interview Summary Form will not normally be considered a complete and proper recordation of the interview unless it includes, or is supplemented by the applicant or the examiner to include, all of the applicable items required below concerning the substance of the interview.

A complete and proper recordation of the substance of any interview should include at least the following applicable items:

- 1) A brief description of the nature of any exhibit shown or any demonstration conducted.
- 2) an identification of the claims discussed.
- 3) an identification of the specific prior art discussed.
- 4) an identification of the principal proposed amendments of a substantive nature discussed, unless these are already described on the Interview Summary Form completed by the Examiner.
- 5) a brief identification of the general thrust of the principal arguments presented to the examiner.
(The identification of arguments need not be lengthy or elaborate. A verbatim or highly detailed description of the arguments is not required. The identification of the arguments is sufficient if the general nature or thrust of the principal arguments made to the examiner can be understood in the context of the application file. Of course, the applicant may desire to emphasize and fully describe those arguments which he or she feels were or might be persuasive to the examiner.)
- 6) a general indication of any other pertinent matters discussed, and
- 7) if appropriate, the general results or outcome of the interview unless already described in the Interview Summary Form completed by the examiner.

Examiners are expected to carefully review the applicant's record of the substance of an interview. If the record is not complete and accurate, the examiner will give the applicant an extendable one month time period to correct the record.

Examiner to Check for Accuracy

If the claims are allowable for other reasons of record, the examiner should send a letter setting forth the examiner's version of the statement attributed to him or her. If the record is complete and accurate, the examiner should place the indication, "Interview Record OK" on the paper recording the substance of the interview along with the date and the examiner's initials.